FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 13 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 423

SHAWKEE MANUFACTURING COMPANY,
GLENSHAW GLASS COMPANY,
McKEE GLASS COMPANY,
GEORGE R. HAUB, Petitioners,

v.

HARTFORD-EMPIRE COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND SUPPORTING BRIEF.

WILLIAM B. JASPERT,
Counsel for Petitioners.

October, 1943.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

INDEX.

	PAGE
Petition for Writ of Certiorari	1
Summary Statement of the Matter Involved	2
Questions Presented	9
Reasons Relied Upon for the Writ of Certiorari	9
Brief in Support of Petition for Writ of Certiorari	11
Opinions of the Courts Below	11
Jurisdiction	11
Statement	12
Specifications of Error	12
Summary of Argument	13
Argument	13
POINT I.—The decision of the Third Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals	13
POINT II.—The majority opinion of the court below is in conflict with the decisions of this Court	18
POINT III.—The decision below is the machinery for effecting the fraud by which respondent has monopolized a major industry	19
POINT IV.—The decision below is in conflict with this Court's decision in the Keystone Driller case	20

Cases and Statutes Cited.

PAGE

Summary 21

Chronology 23

Cases and Statutes Cited.

Aguilar v. Standard Oil, 318 U. S. 724, 726 12

Art Metal Works v. Abraham & Straus, Inc., 107 F. 2d 940 and 107 F. 2d 944, Cert. den. 308 U. S. 621 13-17

DeForest Radio Co. v. General Electric, 283 U.S. 664 12

Hartford-Empire Co. v. Hazel-Atlas Glass Co., 39 F. 2d 111, 120; 59 F. 2d 399, 413 2-6-7

Hartford-Empire Co. v. Shawkee Mfg. Co. et al., 18 U.S.P.Q. 119; 68 F. 2d 726 2-7

Judicial Code, 28 U.S.C. 347, sec. 240-(a) 12

Judicial Code, 28 U.S.C. 377, sec. 262 17

Keystone Driller Co. v. Excavator Co., 290 U. S. 240 10-13-20

Marshall v. Holmes, 141 U. S. 489 18-19

Muncie Gear Works v. Outboard Marine & Mfg. Co., 315 U. S. 759 12

In re New England Oil Refining Co. et al., 9 F. 2d 344 16

Powers-Kennedy Contracting Corp. v. Concrete Mixing etc. Co., 282 U. S. 175, 176 12

Reynolds v. United States, 292 U. S. 443 12

Saranac Automatic Mach. Corp. v. Wirebounds Patent Co., 282 U. S. 704, 705 12

Cases and Statutes Cited.

PAGE

Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173 12

Southern Railway Co. v. Walters, 284 U. S. 190..... 12

Southland Gasoline v. Bayley, 319 U. S. 44..... 12

United States ex rel. Fisher v. Williams, 67 Fed. 384 16

United States v. Mayer, 235 U. S. 55..... 15

United States v. Sterline et al., 70 F. 2d 708..... 16

United States v. Throckmorton, 98 U. S. 61..... 18

United States Industrial Chemicals v. Carbide & Carbon Chemicals, 315 U. S. 668, 669..... 12

White v. Toomey, 4 H.L.C. 319..... 15

Williams Mfg. Co. v. United Shoe Machinery, 316 U. S. 364 12

Winslow v. Staab, 242 F. 426 (C.C.A. 2)..... 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. .....

SHAWKEE MANUFACTURING COMPANY,
GLENSHAW GLASS COMPANY,
McKEE GLASS COMPANY,
GEORGE R. HAUB, Petitioners,

v.

HARTFORD-EMPIRE COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Shawkee Manufacturing Company, Glenshaw Glass Company, McKee Glass Company and George R. Haub, respectfully pray for a writ of certiorari to the Circuit Court of Appeals For The Third Circuit to review the judgment of that court entered on June 30, 1943.

A transcript of the proceedings in said Circuit Court of Appeals is furnished herewith, in accordance with rule 38 of this Court. The opinion of the Court of Ap-

peals for the Third Circuit (not reported) is printed at page 93 of the record and is unofficially reported in 58 U.S.P.Q. 348, 355. A petition for a writ of certiorari to the same Court has been filed recently in the companion case of Hartford-Empire Company v. Hazel-Atlas Glass Company, No. 398.

Summary Statement of the Matter Involved.

On October 21, 1941, Shawkee Manufacturing Company, Glenshaw Glass Company, McKee Glass Company and George R. Haub filed a petition in the Circuit Court of Appeals for the Third Circuit for leave to file a bill of review.*

The petition alleged in substantial part that a fraud had been practiced upon the Court of Appeals below in connection with the appeal in a suit entitled Hartford-Empire Company v. Hazel-Atlas Glass Company and that it had induced that court's order (59 F 2d, 399, 413) reversing the decree of the District Court in that case (39 F 2d, 111, 120); and that the decision in the Hazel case in turn was employed by respondent to compel the decree of the District Court in respondent's favor in the case of Hartford-Empire Company v. Shawkee Manufacturing Company et al., affirmed by the Court of Appeals, 68 F 2d 726.

In an opinion filed December 29, 1941 (R. 59), the Court of Appeals below denied the prayers of the petition for leave to file a bill of review as framed and granted leave to petitioner to amend the prayer to petition the Court of Appeals to set aside the judgment heretofore entered in that court in view of the fact that the petition alleged that fraud was practiced upon the

* A chronology of events is printed as an appendix hereto.

Court of Appeals rather than upon the district court, the opinion further stating that the court would adopt the practice followed by the Circuit Court of Appeals for the Second Circuit in the case of *Art Metal Works, Inc. v. Abraham,* 107 F 2d 940 and 944, cert. denied 308 U. S. 621.

The petition was amended accordingly and filed in the Court of Appeals and on June 30, 1943 the court, Circuit Judge Jones and Circuit Judge Maris, dismissed the petition to vacate and set aside the decree, Circuit Judge Biggs dissenting, the majority opinion holding that the court lacked the power to set aside its decree after the end of the term at which the mandate was dispatched and on the further ground that the fraud worked upon the court, which the court held to be indisputably established, did not effect the entry of the decree complained of, even though there are numerous references to it in the opinion. The dissenting opinion held that the Court of Appeals does possess the power to set aside the decree in question if the evidence warrants, and further that the fraud practiced upon the court did serve to effect the decision of the court.

The majority opinion further held that although the evidence of the fraud may be taken as indisputably established, it does not qualify as after-discovered evidence because the question of the fraud had been imparted to Judge Buffington by correspondence passing between counsel for petitioners and counsel for respondent, and that because three copies of letters passing between counsel were submitted to Judge Buffington, the matter was presumably called to the attention of the full court that had rendered the decision in the case. The dissenting opinion held that the allegations of the correspondence were based on hearsay evidence which petitioners were unable to substantiate and that the court did not act upon it, presumably because it was

not evidence of such a kind or of such weight as would justify action.

The newly discovered evidence consists of memoranda and letters taken from the private files of the respondent Hartford-Empire Company and the Owens Glass Company which conclusively establishes a conspiracy between these companies to perpetrate a fraud upon the Patent Office by publishing an article laudatory of the patented thing, under the name of one William P. Clarke, President of a labor union. The Clarke article was neither asserted in the District Court nor relied upon by the District Judge but was, as stated in the dissenting opinion by Judge Biggs (R. 107):

> "• • • served up to this court upon Hartford-Empire Company's brief and a majority of this court did eat thereof. The fraud, therefore was upon this court and affected its appellate jurisdiction."

The Nature of the False Clarke Article.

The proof of the deceptive design and use of the spurious authorship of the Clarke article was discovered in a suit entitled United States of America v. Hartford-Empire Co. et al., Case No. 7 to 16 now before this court on appeal. Prior to that time petitioners knew only some of the facts and these merely on hearsay. The evidence now shows that Robson D. Brown, Vice President and chief patent counsel of respondent, Hartford-Empire Co., suggested the publication of said article to Henry W. Carter, an officer and counsel for Owens Glass Company (which had a cross license arrangement with respondent company) for the purpose of influencing the Patent Office to a more favorable consideration of the broad claims, then pending and under rejection by the

Patent Office, in the application which has matured into the Peiler patent in suit No. 1,655,391 (R. 7).

R. F. Hatch, attorney of Hartford, in collaboration with Carter, prepared the article for the purpose of publishing a chart showing the relative production of glass articles by respondent's feeding method and the Owens method, and for the further purpose of getting laudatory statements of respondent's method into print (R. 10). It was published in the name of Clarke to make it appear, contrary to the fact, that it came from an unbiased source and one hostile to labor-saving devices (R. 7). The said Clarke was paid $8,000 in cash by Hatch shortly after the decision of the Court of Appeals in the Hazel-Atlas case (R. 6) and was retained by respondent for a period of years.

The Clarke article was published in the National Glass Budget July 17, 1926, and "planted" in the Patent Office in the application of Peiler patent 1,655,391 by Brown and Dorsey, attorneys for respondent company, particular reference being made to the false production curve shown in the chart as establishing the revolutionary character of the invention (R. 8). The correspondence between Hatch and Carter now demonstrates that the article knowingly and intentionally misrepresented the facts for both of them admitted that the article contained false representations (R. 10). With reference to the production chart, the correspondence establishes that the number of Owens machines used in estimating production was knowingly incorrect (R. 10) and the curve establishing the extent of use of the Hartford feeder is not based on actual production but is assumed from minimum royalties which had to be paid to Hartford by its licensees (R. 11).

It was the difference between the drop in production of the Owens machine in the depression of 1921 and the alleged increase in production at that time

(based upon minimum royalties) of Hartford's Peiler machines that established Hartford's claim for a revolutionary invention.

The true character of the article may further be measured by Carter's own statement in criticism of it (R. 10):

> "Under the circumstances, I do not see that we need be very critical in our treatment of the article. *If not too rank,** would say that we better let it go through * * *."

The Fraudulent Use of the Clarke Article.

Respondent referred to the Clarke article in its brief in the Court of Appeals, wherein it was of record only as part of the file wrapper history of the patent in suit. The brief stated that the Clarke article gives an admirable outline of the effect of the Peiler plunger method on the Owens machine business, and with reference to the chart of the Clarke article respondent stated that the production curves of the two types of machines speak for themselves. These assertions were known to be false when they were made to the court by respondent.

The majority opinion of the Court of Appeals below (59 F. 2d 399) by Circuit Judges Buffington and Davis (Judge Woolley sharply dissenting) made frequent reference to and quoted extensively from the Clarke article which, the court, supposing it was from an unbiased and hostile source, accepted as true. The majority opinion relied upon the Clarke article as establishing what glass feeding machines were practical, and which were regarded as unsuccessful prior art. The court was thereby led to disregard the prior art relied upon

* Emphasis by italics in petition and brief is ours unless otherwise stated.

by the District Judge in his finding that the claims were not entitled to a broad construction and accordingly gave to the claims a very wide scope.

On May 31, 1933, respondent, in reliance upon the Court of Appeals decision in the *Hazel-Atlas Glass* case brought suit against petitioners, *Shawkee Manufacturing Company et al.,* for infringement of the same Peiler Patent No. 1,655,391, by an entirely different apparatus and method. The bill of complaint in that case made frequent reference to the Court of Appeals decision in the *Hazel-Atlas* case.

In its opinion (reported 18 U.S.P.Q. 119) the trial court made reference to the Court of Appeals decision in the case of *Hartford-Empire v. Hazel-Atlas Glass Company,* 59 F. 2d 399, as holding the patent valid, and on appeal the Circuit Court of Appeals, 68 F. 2d 726, said:

> "The patent involved was considered by this Court in Hartford-Empire Co. v. Hazel-Atlas Glass Co., reported in 59 F. 2d 399. *Reference thereto obviates needless restatement of the art. It suffices to say the patent in question (Peiler's patent No. 1,655,391) was there held valid.* * * *. Accordingly, we held in the Hartford-Empire Hazel-Atlas Case that the claims of the Peiler patent there in suit were broad enough to cover the Hazel-Atlas device. *For the same reasons we hold that the claims of the patent here in suit are broad enough to cover the defendants' device.*"

As in the *Hazel* case, where the court swept aside the prior art by its reliance upon the Clarke article for "what machine blowers were of practical working capacity", so in the *Shawkee* case the Court of Appeals completely ignored the prior art, relied upon by the defendant below, by reference to its former decision in

the *Hazel* case, even though the Shawkee feeder and feeding method which was for feeding by positive and negative air impulses did not employ the reciprocating plunger of the Peiler patent which was employed by the defendant in the *Hazel-Atlas* case. While generally the same prior art would be pertinent in either the *Hazel* or *Shawkee* cases on the question of validity of the Peiler patent, it would have entirely different significance in the interpretation of the claims for the purpose of establishing infringement of these radically different methods and apparatuses.

It therefore appears from the decision in the *Shawkee* case that the Court of Appeals' decision in the *Hazel-Atlas* case was based largely if not entirely on the statements quoted by Judge Buffington from the Clarke article. It further appears that the decision in the *Shawkee* case was procured by respondent's intentional and frequent reference to the favorable decision which it had obtained in the *Hazel-Atlas* case by its fraud on the court.

As stated in the dissenting opinion by Circuit Judge Biggs, (R. 110),

> "Can it be believed that Judge Buffington would have quoted from or accredited the contents of this article *if he had been aware that it had emanated from certain of Hartford-Empire's counsel who had employed it to perpetrate a fraud on the United States Patent Office?* The answer must certainly be in the negative."

So in the Shawkee case on appeal before the same Court, can it be believed that the same Circuit Judges would have given the same Peiler patent even broader scope, so as to include the Shawkee air feeder, had they been aware of the corruption of Clarke and of the fraud practiced by Hartford's counsel?

Questions Presented.

1. Did the Court of Appeals for the Third Circuit lack power to set aside its decree obtained by fraud after the end of the term at which the mandate was dispatched?

2. Whether the accredited contents quoted by the Court of Appeals from the false Clarke article affected the Court's judgment in the *Hazel-Atlas* case and consequently in the *Shawkee* case?

3. Should the Court of Appeals for the Third Circuit dismiss the bill of complaint under the ruling of this Court in *Keystone Driller Co. v. Excavator Co.*, 290 U. S. 240?

4. Whether newly discovered evidence, which is proof of a fraud previously questioned and called to the attention of the court, but proof of which was not sooner available, qualifies as after discovered evidence.

Reasons Relied Upon for the Writ of Certiorari.

1. Because the decision of the majority of the Court of Appeals for the Third Circuit, holding that the Court lacked the power to vacate its decision and orders obtained by fraud, after the term of court had expired, is contrary to law and in conflict with the decisions of other Circuit Courts of Appeals.

2. Because the decision of the Third Circuit Court of Appeals that an appellate court lacked the power to vacate its decree and order after term where such is obtained by fraud practiced on the appellate court is of great importance to the administration of justice and is in conflict with the applicable decisions of this Court and other circuit courts of appeals.

3. Because the Court of Appeals for the Third Circuit, by reversing the trial court in its reliance upon corrupt and false evidence has made its decision the machinery for effecting the monopoly in the manufacture, sale and use of unpatented glass articles in a major industry, which resulted in the suit by the United States Government entitled *United States of America v. Hartford-Empire Co. et al.*, No. 7 to 16, now before this Court on appeal.

4. Because the decision below in the *Shawkee* case obtained on the basis of the fraud in the *Hazel-Atlas Glass* case is in conflict with the decision of this Court in *Keystone Driller Co. v. Excavator Co.*, 290 U. S. 240.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit sitting at Philadelphia, Pennsylvania, commanding said Court to certify and send to this Court on a day to be designated a full transcript of the record and all proceedings in the Court of Appeals, had in these proceedings, to the end that this case may be reviewed and determined by this Court, and the judgment of the majority of said Circuit Court of Appeals be reversed and the dissenting opinion be affirmed; and that petitioners be granted such other and further relief that may be proper.

WILLIAM B. JASPERT,
Counsel for Petitioners.

October, 1943.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. .....

SHAWKEE MANUFACTURING COMPANY,
GLENSHAW GLASS COMPANY,
McKEE GLASS COMPANY,
GEORGE R. HAUB, Petitioners,

v.

HARTFORD-EMPIRE COMPANY, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Court Below.

The opinion of the Circuit Court of Appeals for the Third Circuit, and dissenting opinion, are in the record (R. 93), and are unofficially reported in 58 U.S.P.Q. 348, 355.

Jurisdiction.

The grounds of jurisdiction are:

1. The judgment to be reviewed was entered June 30, 1943 (R. 119).

2. The statute under which the jurisdiction is invoked is Section 240-(a) of the Judicial Code, 28 U.S.C. 347, as amended by the Act of February 13, 1925. Cases believed to sustain the jurisdiction are *Powers-Kennedy Contracting Corp. v. Concrete Mixing, etc., Co.*, 282 U. S. 175, 176; *Saranac Automatic Mach. Corp. v. Wirebounds Patent Co.*, 282 U. S. 704, 705; *U. S. Industrial Chemicals v. Carbide and Carbon Chemicals*, 315 U. S. 668, 669, and *Southland Gasoline v. Bayley*, 319 U. S. 44; *Aguilar v. Standard Oil*, 318 U. S. 724, 726, where there were conflicts of decisions. Also, this Court has granted certiorari where there was no conflict between different circuits when important questions of law were presented, *De Forest Radio Co. v. General Electric*, 283 U. S. 664, *Muncie Gear Works v. Outboard Marine & Mfg. Co.*, 315 U. S. 759; *Williams Mfg. Co. v. United Shoe Machinery*, 316 U. S. 364, *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, *Reynolds v. United States*, 292 U. S. 443; *Southern Railway Co. v. Walters*, 284, U. S. 190, etc.

Statement.

The facts are sufficiently stated in the petition.

Specifications of Error.

The errors which petitioner will urge, if the writ of certiorari is granted, are that the majority of the Circuit Court of Appeals for the Third Circuit erred in holding:

1. That it lacked power to set aside its decree obtained by fraud after the end of the term at which the mandate was dispatched.
2. That the accredited contents quoted by Judge Buffington from the false Clarke article did not affect the Court's judgment.

3. That the newly discovered evidence adduced at the trial of the Government anti-trust suit does not qualify as after discovered evidence.

4. In failing to vacate its decree and dismiss the bill under the ruling of this Court in *Keystone Driller Co. v. Excavator Co.*, 290 U. S. 240.

Summary of Argument.

The points of argument follow the reasons relied upon for the allowance of the writ.

Argument.

The merits of this case are presented in the majority and dissenting opinions below, and also in the petition (*supra*, p. 4).

POINT I.

The Decision of the Third Circuit Court of Appeals Is in Conflict With Decisions of Other Circuit Courts of Appeals.

In denying the petition originally filed by respondent in the Court of Appeals below, which was for leave to file a bill in the nature of a Bill of Review, the court granted petitioners leave to amend the petition to move the Court of Appeals to set aside its judgment on the ground of fraud practiced on the court, following the practice of the Circuit Court of Appeals for the Second Circuit in *Art Metal Works Inc. v. Abraham & Straus*, 107 F. 2d 940 and 944, certiorari denied 308 U. S. 621. By now holding that application should be made to the District Court the Court of Appeals in effect reversed itself. The majority opinion by Circuit Judge Jones,

Circuit Judge Maris concurring, distinguishes the present case from the *Art Metal* cases on the ground that in the latter cases no qualified court had disposed of those appeals because a judge of the Court of Appeals had been corrupted in respect of the litigation, and that therefore no competent mandates ever issued. With reference to the case at bar the court held that it was without power to change a final decree of a district court after the term in which the decree was entered has expired.

The dissenting opinion, by Circuit Judge Biggs, held that the apparent facts in the case at bar bear an analogy to the circumstances which were before the Circuit Court of Appeals of the Second Circuit in the *Art Metal* cases, and that in those cases the court acted to protect the integrity of its appellate jurisdiction and that the difference between the *Art Metal* cases and those at bar, including the companion case of *Hartford-Empire v. Hazel-Atlas Glass Co.*, seemed to be only one of degree, that in both cases the fraud was worked upon the appellate tribunals. The dissenting opinion is to the point that in either case no valid order or mandate can issue on invalid and irregular legal proceedings, and that an appellate court may vacate its decision and order after term if the invalidity and irregularity of the legal proceedings is established.

There are other decisions supporting this view. In *Winslow v. Staab*, 242 Fed. 426 (CCA 2), the Second Circuit Court of Appeals affirmed the trial court in setting aside its decree after term which the court had been induced to sign by misrepresentation of fact. The court said:

> "A court which can protect against a judgment obtained at law by fraud, accident or mistake, is not powerless to relieve from a decree so obtained."

With reference to the decision by this court in *U. S. v. Mayer*, 235 U. S. 55, 35 Sup. Ct. 16, the court in the *Winslow* case pointed out that there were exceptions to the general rule that a final judgment cannot be set aside after the term. The court then analyzed numerous cases, including the technical rules and decisions of the English courts, and quoted extensively from the decision of the House of Lords in *White v. Tommey*, 4 H.L.C. 313, a portion of which is quoted for the convenience of the court, as follows:

> "* * * Although in any question decided by this House upon appeal the matter is finally settled between the litigant parties, it is always subject to this condition: That if one party has, by any misrepresentation—I will not put it so highly as to say fraud, for I do not wish to use harsh terms—but, if by misrepresentation, inadvertently (if you will) introduced, a party has led the House into an error, has led it to suppose that something is going on irregularly, *all the commonest principles of justice compel this house, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting a fraud or the machinery for effecting that which, if not done per incuriam, would have been a fraud* * * *. What is the relief then, which your Lordships in your wisdom ought to think fit to grant to the parties? Evidently to put them in precisely the same position as that in which they were before that erroneous order was made (behind their backs), giving leave to Tommey to present the appeal which has led to all the difficulty. * * * I shall move your Lordships to discharge those orders, and to direct that the Court of Chancery in Ireland should deal with the case remitted back to it by the order of 1850 in such a way as may be

just, having regard to the fact that the several orders aforesaid have been discharged."

In *United States v. Sterling, et al,* 70 F 2d 708, certiorari denied, *Commercial Trust Co. of New York v. U. S.,* 55 S. Ct. 97, 293, U. S. 584, the Circuit Court of Appeals for the Second Circuit affirmed its earlier decision in *Winslow v. Staab* and said:

> "A mistake of the clerk, whereby the Court is induced to enter a wrong judgment, *like a misrepresentation by a party or his counsel* (even though innocent) upon which a judgment has been founded, *is a ground for annulling the judgment even after the term has ended.* In either case the court may modify or vacate the judgment without resort to a separate suit in the nature of a bill of review. *Winslow v. Staab* (C.C.A.) 242 F. 426."

The *Winslow* case was followed by the Circuit Court of Appeals for the First Circuit in *In re New England Oil Refining Co., et al.,* 9 Fed. 2d 344, the court saying:

> "There is authority for the proposition that, where a decree in an equity proceeding has been procured *through false representation or misrepresentation to the court,* and would not have been entered except therefor, the court in which the decree was entered has power, even after the term to vacate it on motion."

In an earlier case, *United States ex rel. Fisher v. Williams,* 67 Fed. 384, the Circuit Court of Appeals for the Eighth Circuit held that a Federal Circuit Court has power to set aside a final decree which the judge has been induced to enter by false representation. The court said:

> "We are of the opinion that when, by a mistake of the judge; *induced by erroneous statements of*

counsel, a decree has been entered of record which the judge did not examine or approve, and did not intend to enter, such decree may be set aside, on motion, after as well as before the expiration of the term."

All of the foregoing cases held that it was not necessary to proceed by way of a bill to set aside the judgment. With the exception of the House of Lords decision in *White v. Tommey (supra),* the foregoing cases deal with the power of a trial court to vacate its decree after term. The case of *Art Metal Works v. Abraham and Straus,* 100 F. 2d 940 and 944, cert. den. 308 U. S. 621, and *White v. Toomey* deal with the question of an appellate court's power to vacate its decree or order for fraud practiced upon the appellate court. As stated by Judge Biggs in the dissenting opinion, R. 106:

"The difference between the *Art Metal Works* cases and those at bar seems to me to be only one of degree. In the former cases a litigant had corrupted the court. In the cases at bar, if the allegations of the petitions and the supporting affidavits are correct, a litigant has corrupted the record by knowingly inserting fraudulent matter therein and calling the corrupt matter to the attention of this tribunal. *In neither the Art Metal Works cases nor in the cases at bar was the fraud perpetrated upon the lower courts. The significant fact is that the fraud was worked upon the appellate tribunals.* * * * In view of these facts should we not ourselves dispose of the matters raised by the petitions? We have at our disposal every writ necessary to protect and maintain our jurisdiction. See Section 262 of the Judicial Code, 28 U.S.C.A. 377."

POINT II.

The Majority Opinion in the Court Below Is in Conflict With Decisions of This Court.

In questioning its jurisdiction to hear and dispose of the matter of vacating its decree and order the Court of Appeals below referred to this Court's decisions in *United States v. Throckmorton,* 98 U. S. 61, and *Marshall v. Holmes,* 141 U. S. 589, as applicable only where jurisdiction is established for the purpose of determining whether the alleged fraud is extrinsic or intrinsic. These decisions are not on the point of whether an appellate court has power to vacate its decrees and orders after term where such were obtained by fraud on the appellate court. These cases do, however, decide the question of the power of a court to vacate a decree after term where the fraud is extrinsic, as in the *Throckmorton* case, or intrinsic, as in *Marshall v. Holmes.*

In the *Throckmorton* case this Court held that relief will be granted where by fraud or deception an unsuccessful party has been prevented from exhibiting fully his case, the court making a distinction, however, as follows:

> "On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

If in the case at bar an applicant were seeking relief because of the use of the Clarke article in the Patent Office in the procurement of the patent, which under the decisions would be an intrinsic fraud, the case would fall under the exception noted by this Court in the *Throck-*

morton case. Since, however, petitioners are seeking relief from the judgment because of the fraud practiced upon the court, which prevented petitioners from fully exhibiting their case, e.g., the state of the prior art by which the trial court held the patent limited in its scope, the case falls under the rule of the Throckmorton case that such fraud vitiates the decision.

In *Marshall v. Holmes*, 141 U. S. 589, this Court extended the rule of the Throckmorton case to grant relief from judgment after term where such is based on false testimony and forged documents, which in the case at bar constitute authority for vacating the Hazel and Shawkee decisions on the ground alone that the patent there in suit was procured by irregular and invalid proceeding through the misrepresentation of counsel and the use of corrupt and false evidence.

Upon the application of the rule in either the Throckmorton case or the case of *Marshall v. Holmes*, the court below should have vacated its decree.

POINT III.

The Decision Below Is the Machinery for Effecting the Fraud by Which Respondent Has Monopolized a Major Industry.

The decision of the Court of Appeals in the *Hazel-Atlas* case gave respondent a monopoly in the method of feeding molten glass to ware forming machines by use of a reciprocating plunger. The subsequent decision by the same court in the *Shawkee* case extended the monopoly under the patent to cover the air impulse feeding method which does not employ a plunger.

By these decisions respondent effectually overcame the resistance to its licensing policy of the Hazel-Atlas

Glass Company, the then largest independent producer of bottles in the industry, and Ball Bros. Glass Company, the largest producer of fruit jars.

The complete collapse of these large manufacturers resulted in a number of settlements with other manufacturers of glass ware who accepted licenses, the total royalty from which amounted to many millions of dollare since the decision in the *Hazel-Atlas* case (R. 51). The far reaching effect of these decisions is tersely stated in the petition and brief filed on behalf of the United States of America as Amicus Curiae (R. 47) in the court below.

The use made of the monopoly thus fraudulently obtained, to control the kind and quantity of unpatented articles in the glass container industry, resulted in the suit by the United States of America entitled "United States of America v. Hartford-Empire Co. et al., No. 7 to 16," now before this Court on appeal.

POINT IV.

The Decision Below Is in Conflict With This Court's Decision in the Keystone Driller Case.

In *Keystone Driller Co. v. Excavator Co.*, 290 U. S. 240, this Court held that where a plaintiff in a suit on a patent sought relief partly on the basis of a decree in another case which sustained the patent and in the obtaining of which the plaintiff through corruption had suppressed evidence damaging to that patent, the use made of the prior decree sustaining the patent brought the pending case within the doctrine that "he who comes into equity must come with clean hands," and the case was properly dismissed on that ground.

In that case the plaintiff had suppressed evidence of a prior use and obtained a favorable decree upholding the patent which it employed in a subsequent suit as a basis for injunction *pendente lite.*

In the *Shawkee* case the injunction *pendente lite,* made final on appeal, was procured on the basis of the decision in the Hazel case by direct reference thereto in the bill of complaint, paragraphs 9, 10 and 11, Shawkee trial record pp. 5 and 6. The facts of the suppression of evidence and the procedure are similar to the *Keystone Driller Co.* case and the decree of the court of appeals below should be vacated and the bill dismissed.

Summary.

Under the uniform decisions of the Circuit Court of Appeals, where a similar question has arisen and under the decisions of this Court, the majority of the Court of Appeals erred in denying the petition for relief in their holding that the court had no power to vacate its decrees and orders.

There was no laches attributable to petitioners even though the source of the article may have been questionable. The corruption of Clarke precluded the Hazel-Atlas Glass Company and the Shawkee Company from ascertaining the facts, and it was not until the Government removed the evidence from the private files of respondent and the Owens Glass Company in the anti trust case that it became available to petitioners who acted promptly in filing their petition in the court below.

The court below in applying the rule of the *Toledo Scale* case R 102 as to the need for putting an end to litigation, has completely ignored the fact that its decisions in the *Hazel* and *Shawkee* cases are the basis for

endless litigation so long as any glass manufacturer may elect not to pay tribute under Peiler patent 1,655,391 and other patents which were issued on mandamus in a suit against the Commissioner of Patents reported in 87 F. 2d 741, wherein respondent fraudulently directed that court's attention to Judge Buffington's laudatory statements of Peiler's contribution to the art of glass feeding in the *Hazel-Atlas* case.

The petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

WILLIAM B. JASPERT,
Counsel for Petitioners.

October, 1943.

APPENDIX.

Chronology.

This suit was filed on May 31, 1933; decided against defendants on motion for preliminary injunction on June 22, 1933; upon appeal, the parties agreeing that decision as on final hearing might be made, the Court of Appeals on January 11, 1934, decided against defendants; defendants filed on February 8, 1934, a petition for rehearing, which petition was denied on February 21, 1934; Shawkee filed petition to this Court for writ of certiorari on April 3, 1934, which was denied May 7, 1934, 292 U. S. 640; on May 29, 1934 Shawkee filed in the Circuit Court of Appeals a petition for leave to file a bill of review, which was denied on July 23, 1934; Shawkee filed a second petition to this Court for writ of certiorari on September 7, 1934, which was denied October 15, 1934, 293 U. S. 600; on October 20, 1934 Shawkee filed a petition in the Circuit Court of Appeals to amend and reform its mandate, which was denied on November 14, 1934; Shawkee filed on April 8, 1935, a second petition in the Circuit Court of Appeals for leave to file a bill of review, which was denied on July 3, 1935; Shawkee on October 1, 1935, filed its third petition to this Court for writ of certiorari, which was denied on October 28, 1935; 296 U. S. 635; on March 5, 1938, Shawkee filed in the Circuit Court of Appeals a petition for rehearing and for leave to file supplemental amendment to the answer, which was denied on May 31, 1938.